

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF OREGON

3 PORTLAND DIVISION

4
5 DEBORAH TOLLE and JENNIFER AVERHOFF,

6 Plaintiffs,

No. 03:13-cv-00570-HU

7 vs.

8 SAFEGUARD PROPERTIES MANAGEMENT, LLC,
a Delaware limited liability company;
9 and LISA DEMPSEY, *dba* Allstate
Property Group, and *dba* The People's
10 Document Source, Individually;

**FINDINGS & RECOMMENDATION
ON MOTION FOR
DEFAULT JUDGMENT**

11 Defendants.¹
12 _____

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18 Attorneys for Plaintiffs
19
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21 HUBEL, Magistrate Judge:

22 The plaintiffs Deborah Tolle and Jennifer Averhoff filed this
23 action for unpaid wages and penalties under the federal Fair Labor
24 Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), and Oregon wage
25 and hour laws; and also for breach of contract. Dkt. #1. Personal
26 service on the defendant Lisa Dempsey was accomplished on May 13,

27 _____
28 ¹The defendant Safeguard Properties Management, LLC has been
dismissed from this action with prejudice. Dkt. #20.

1 2013. Dkt. #8. Dempsey failed to move or plead in response to the
2 Complaint, and on June 25, 2013, the court granted the plaintiffs'
3 motion for entry of default against Dempsey. Dkt. #11. The plain-
4 tiffs now move for default judgment against Dempsey pursuant to
5 Federal Rule of Civil Procedure 55(b). Dkt. #24. The undersigned
6 submits the following findings and recommended disposition of the
7 motion pursuant to 28 U.S.C. § 636(b)(1)(B).

8 Rule 55(b) specifies two ways in which a plaintiff can obtain
9 a judgment when the defendant is in default, one involving entry of
10 judgment by the Clerk of Court, and one requiring entry of judgment
11 by the court. The plaintiffs argue they have met the requirements
12 for entry of judgment under both standards.

13 Under subsection (1), so long as the defendant "is neither a
14 minor nor an incompetent person," the Clerk of Court must enter a
15 default judgment when "the plaintiff's claim is for a sum certain
16 or a sum that can be made certain by computation[.]" Fed. R Civ.
17 P. 55(b)(1). Defendant Dempsey is neither incompetent nor a minor.
18 See Dkt. #26, ¶ 3; Dkt. #27, ¶ 3; Dkt. #28, ¶ 3. The Ninth Circuit
19 has observed that there is a "paucity of federal case law"
20 regarding the "sum certain requirement," concluding "a claim is not
21 a sum certain unless no doubt remains as to the amount to which a
22 plaintiff is entitled as a result of the defendant's default."
23 *Franchise Holding II, LLC v. Huntington Restaurants Group, Inc.*,
24 375 F.3d 922, 928-29 (9th Cir. 2004) (adopting the First Circuit's
25 approach in *KPS & Assocs., Inc. v. Designs By FMC, Inc.*, 318 F.3d
26 1, 19 (1st Cir. 2003)). In *Franchise Holding II*, the court found
27 the sum certain requirement was satisfied where the plaintiff
28 provided the court with "loan documents that set forth the specific

1 formulas for determining the amount owed," and "documents setting
2 forth the various amounts necessary for calculating the total
3 amount due." *Id.*, 375 F.3d at 929. If the "sum certain" of a
4 plaintiff's claim cannot be calculated reasonably by simple compu-
5 tation, and other evidence is required, then the plaintiff must
6 apply to the court for a default judgment pursuant to Rule
7 55(b) (2) .

8 In the present case, the plaintiffs argue their unpaid wages
9 and statutory damages can be made certain by computation from the
10 evidence they have provided, meeting the requirements for the Clerk
11 of Court to enter a default judgment pursuant to Rule 55(b) (1) .
12 Each of the plaintiffs has submitted a declaration setting forth
13 the dates and hours she worked, amounts she was paid, amounts
14 remaining unpaid, and unsuccessful efforts to collect the unpaid
15 amounts from Dempsey. Dkt. ##27 & 28. The plaintiffs' attorney
16 Erin Pettigrew has submitted a declaration setting forth the step-
17 by-step process she employed to determine the amounts owed each of
18 the plaintiffs representing unpaid minimum wages under Oregon law,
19 liquidated damages under the FLSA, and statutory penalties under
20 Oregon law. Dkt. #26; see Dkt. #25, p. 16. Because calculation of
21 the plaintiffs' damages involved an estimation of travel times
22 between the homes the plaintiffs inspected, see Dkt. #26, ¶¶ 5 & 7,
23 the court finds the plaintiffs' claim does not meet the require-
24 ments for a "sum that can be made certain by computation"; rather,
25 the court must consider additional evidence, provided by the
26 plaintiffs in their declarations, in order to determine whether the
27 plaintiffs' damages have been calculated accurately. As a result,

1 the court will consider the plaintiffs' motion for default judgment
2 pursuant to Rule 55(b)(2).

3 The first category of damages the plaintiffs seek to recover
4 is unpaid wages and civil penalties under ORS § 653.055, which
5 provides, *inter alia*, that "[a]ny employer who pays an employee
6 less than the wages to which the employee is entitled under
7 [Oregon's minimum wage statutes] is liable to the employee
8 affected: (a) [f]or the full amount of the wages, less any amount
9 actually paid to the employee by the employer; and (b) [f]or civil
10 penalties provided in ORS 652.150." ORS § 653.055(1).

11 To establish the number of hours worked, the plaintiff
12 Jennifer Averhoff indicates she used her own vehicle to travel
13 between the various homes she inspected. At the start of each day,
14 she entered the addresses of the properties she was going to visit
15 into "a mapping system," and at the end of each day, she uploaded
16 a report for each inspection, including photographs and a narra-
17 tive. She maintained a spreadsheet that included order numbers for
18 each job, "the value Ms. Dempsey had assigned that particular
19 inspection," and the money she actually was paid for each
20 inspection. Dkt. #28, ¶¶ 6-8. Ms. Tolle employed a similar method
21 of documenting the jobs she performed, distances traveled, and
22 amounts she was paid. Dkt. #27, ¶¶ 6-9.

23 In Ms. Pettigrew's declaration, she explains the method she
24 used to estimate each plaintiffs' travel time for each day of work,
25 based on the plaintiffs' detailed records. She also allotted a
26 conservative twenty minutes for the completion of each home inspec-
27 tion. Dkt. #26, ¶¶ 5 & 7. Multiplying each plaintiff's total
28 hours worked by the Oregon minimum wage, and then deducting amounts

1 already paid in connection with the dismissal of the defendant
2 Safeguard Properties Management, LLC, Ms. Pettigrew's calculations
3 indicate the plaintiff Deborah Tolle is entitled to unpaid Oregon
4 minimum wages of \$325.32, and the plaintiff Jennifer Averhoff is
5 entitled to unpaid Oregon minimum wages of \$743.96. The court
6 finds the method Ms. Pettigrew employed to calculate the plain-
7 tiffs' unpaid minimum wages under Oregon law was reasonable, and
8 the amounts owed to the plaintiffs representing unpaid Oregon
9 minimum wages are accurate and should be awarded.

10 With regard to the civil penalty for failure to pay the plain-
11 tiffs minimum wages to which they were entitled, ORS § 653.055
12 specifies that the civil penalty is calculated as "provided in ORS
13 652.150." ORS § 653.055(b). ORS § 652.150 provides that an
14 employer who "willfully fails" to make timely payment of all wages
15 due when an employee's employment ceases, as required by ORS
16 § 652.140, is subject to a penalty equal to the employee's wage
17 rate times eight hours per day for the number of days the wages
18 remain unpaid, up to a maximum of thirty days. The "willful"
19 requirement in the statute does not contain a malice component; "it
20 merely indicates that the act or omission was purposeful and not
21 the product of inadvertence." *Young v. Oregon*, 340 Or. 401, 409,
22 133 P.3d 915, 919 (2006). The evidence in the present case indi-
23 cates Dempsey's failure to pay the plaintiffs' final wages was not
24 the product of inadvertence. She received notice, before and after
25 this lawsuit was filed, that she had failed to pay the plaintiffs'
26 final wages, but she still failed to pay the wages the plaintiffs
27 were due. See Dkt. #1, ¶¶ 23-26; Dkt. #27, ¶¶ 13-14; Dkt. #28,
28 ¶¶ 14-15. The court finds Dempsey "willfully" failed to pay the

plaintiffs' wages upon termination as required by ORS § 652.140. Because the plaintiffs' final wages remained unpaid for longer than thirty days, the plaintiffs' statutory penalty is limited to thirty days of work (240 hours) times the Oregon minimum wage of \$8.80; i.e., \$2,112.00. See Dkt. #26, ¶ 9; see generally Dkt. #25, pp. 11-13. The court finds each plaintiff is entitled to a penalty under ORS § 651.150 in the amount of \$2,112.00, for Dempsey's failure to pay the wages the plaintiffs were due when they ceased their employment.

Returning to Dempsey's failure to pay the plaintiffs the minimum wages to which they were entitled, the plaintiffs argue they are entitled to a second penalty of \$2,112.00, citing ORS §§ 653.055(b) and 652.150. The plaintiffs assert that awarding two penalties - one for Dempsey's failure to pay wages upon termination, and the other for her failure to pay minimum wages - "is consistent with the object of punishing employers who violate Oregon's wage and hour laws in multiple ways." Dkt. #25, p. 11; see *id.*, pp. 11-13 (citing state and federal cases in support). "[T]he failure to pay a minimum wage is a separate violation from the failure to promptly pay wages upon termination, entitling plaintiff[s] to recovery penalties for both violations." *Castro-Vega v. Waible*, 2007 WL 4885440, at *4 (D. Or. Nov. 7, 2007) (Stewart, MJ), *Findings & Recommendation*, adopted in relevant part, 2008 WL 342754 (D. Or. Feb. 5, 2008) (Haggerty, J); see also *Davis v. Maxima Integrated Prods.*, 57 F. Supp. 2d 1056, 1059 (D. Or. 1999) (Jones, J) ("penalties for failure to pay back wages and penalties for failure to pay overtime seek to remedy two distinct wrongs, thus justifying the imposition of one penalty for each

violation"). Here, Dempsey violated Oregon's wage and hour laws in two distinct ways: failure to pay the statutory minimum wage, and failure to pay wages due upon termination of employment. Accordingly, the court finds the plaintiffs are entitled to recover a separate penalty of \$2,112.00 each for Dempsey's failure to pay their final wages when due, pursuant to ORS §§ 652.140 and 652.150.

The plaintiffs also are entitled to recover liquidated damages under the Fair Labor Standards Act. The Act requires an employer to pay employees of "an enterprise engaged in commerce" a minimum of \$7.25 an hour. 29 U.S.C. § 206(a)(1)(C). An employer who fails to pay wages due under the Act is liable for the amount of the unpaid wages, as well as "an additional equal amount as liquidated damages." 29 U.S.C. § 216(b). Ms. Pettigrew's calculations indicate that after deducting amounts already paid, the plaintiff Deborah Tolle is entitled to recover \$156.53 in FLSA liquidated damages, and the plaintiff Jennifer Averhoff is entitled to recover \$87.70 in FLSA liquidated damages. Dkt. #26, ¶¶ 6 & 8. The court finds Ms. Pettigrew's calculations are reasonable and accurate, and the plaintiffs should be awarded damages under FLSA in those amounts.

The plaintiffs further argue they are entitled to a penalty under ORS § 652.615, for Dempsey's violation of ORS § 652.610(3), which prohibits an employer from making deductions from an employee's wages that are neither authorized in writing by the employee, nor required by law. ORS § 652.615 provides for a private right of action against an employer who makes such unauthorized deductions, "for actual damages or \$200, whichever is greater," as well as attorney's fees and costs. ORS § 652.615.

1 Here, each plaintiff's actual damages are less than the statutory
 2 minimum of \$200. Dkt. #26, ¶ 11. Accordingly, each plaintiff is
 3 entitled to statutory damages in the amount of \$200.00, pursuant to
 4 ORS § 652.615.

5 In summary, the undersigned recommends default judgment be
 6 entered as follows:

7 A. In favor of the plaintiff Deborah Tolle, and against the
 8 defendant Lisa Dempsey, in the total sum of **\$4,905.85**, representing
 9 \$325.32 in unpaid Oregon minimum wages; a civil penalty of
 10 \$2,112.00 for the minimum wage violation; \$156.53 in FLSA liqui-
 11 dated damages; a civil penalty of \$2,112.00 for failure to pay
 12 wages on termination of employment; and a civil penalty of \$200 for
 13 unauthorized deductions from wages.

14 B. In favor of the plaintiff Jennifer Averhoff, and against
 15 the defendant Lisa Dempsey, in the total sum of **\$5,255.66**, repre-
 16 senting \$743.96 in unpaid Oregon minimum wages; a civil penalty of
 17 \$2,112.00 for the minimum wage violation; \$87.70 in FLSA liquidated
 18 damages; a civil penalty of \$2,112.00 for failure to pay wages on
 19 termination of employment; and a civil penalty of \$200 for
 20 unauthorized deductions from wages.

21 22 **SCHEDULING ORDER**

23 These Findings and Recommendation will be referred to a
 24 district judge. Objections, if any, are due by **December 10, 2013**.
 25 If no objections are filed, then the Findings and Recommendation
 26 will go under advisement on that date. If objections are filed,
 27 then any response is due by **December 27, 2013**. By the earlier of
 28

1 the response due date or the date a response is filed, the Findings
2 and Recommendations will go under advisement.

3 IT IS SO ORDERED.

4 Dated this 22nd day of November, 2013.

5
6 /s/ Dennis J. Hubel

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8

Dennis James Hubel
Unites States Magistrate Judge